

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

SIERRA CLUB,)	
)	
Complainant,)	
)	PCB 2014-134
v.)	(Enforcement-Air)
)	
AMEREN ENERGY MEDINA VALLEY)	
COGEN, LLC)	
)	
and)	
)	
FUTUREGEN INDUSTRIAL ALLIANCE INC.,)	
)	
Respondents)	

NOTICE OF FILING

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PLEASE TAKE NOTICE that I have today e-filed with the Office of the Clerk of the Pollution Control Board: RESPONDENTS' RESPONSE TO SIERRA CLUB'S MOTION FOR

EXTENSION OF TIME TO RESPOND TO MOTION FOR SUMMARY JUDGMENT AND
MOTION TO EXPEDITE, a copy of which is herewith served upon you.

DATED this 31st day of July, 2014.

/s/ Kyle C. Barry

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Club's Motion for Extension of Time to Respond to Motion for Summary Judgment and Motion to Expedite ("Motion") is consistent with a delay strategy and should be rejected.

Given that Sierra Club has always been represented by Illinois counsel, the Board's recent denial of Eva Schueller's motion to appear *pro hac vice* does not prevent Sierra Club from responding to Respondents' pending motions.

Moreover, Sierra Club seeks a delay until August 25, 2014, in anticipation of requesting "a more substantial extension" in its response to the Motion for Summary Judgment. (*See* Motion, FN 1.) Accordingly, Sierra Club's Motion appears to be nothing more than a bald delaying tactic as a predicate to raising arguments over its claimed need for a further unwarranted extension.

II. FACTUAL BACKGROUND

The facts relevant to this response are set forth in detail in Respondents' pending motions before this Board. Key facts nevertheless bear additional emphasis.

First, the Project is funded in part by the United States Department of Energy ("USDOE") and in part through private financing. Over \$1 Billion in taxpayer funding is at stake. (*See* Declaration of Kenneth Humphreys in Support of Respondents' Motion to Expedite.)

Second, Sierra Club has participated at all stages of review in this case and has all of the information necessary to respond to Respondents' Motion for Summary Judgment. All relevant records pertaining to IEPA's determination that a PSD permit is not required for the Project are included in the record compiled by IEPA during the FutureGen 2.0 permitting process. These records contain the information about the physical and operational design of the Project, and related emissions, relied upon by IEPA and the applicants in performing the netting analysis including, but not limited to: the permit application; the air construction permit dated December 13, 2013; applicable U.S. EPA and IEPA guidance documents; public comments and IEPA's responses thereto; and, related documents.

Third, Sierra Club's claim before the Board is its third attempt to derail the Project. IEPA considered Sierra Club's arguments and found that the Project did not need a PSD permit.

The U.S. District Court for the Central District of Illinois found that Sierra Club's claims were better evaluated by state regulators capable of evaluating the deficiencies that Sierra Club alleged during the permitting process. Moreover, during the federal litigation, Sierra Club's counsel discussed its discovery needs, and indeed Sierra Club served discovery on Respondents, which was mooted by the Court's dismissal of the case.

Fourth, Respondents have filed a motion to expedite hearing of the motion for summary judgment contending that the very existence of Sierra's claim impedes Respondents' ability to finance the Project. Given that Sierra Club's response to Respondents' Motion to Expedite was due Monday, Sierra Club's response – that it needs more time to address *pro hac vice* issues in a case where it continues to be represented by an Illinois attorney – lacks candor.

Fifth, by its own terms, Sierra Club's request for additional time is a predicate to a further request. Footnote 1 to the Motion provides:

Please note that Sierra Club's response to summary judgment will include a request for a more substantial extension to respond to the pending summary judgment motion in order to complete discovery and obtain evidence that can otherwise not be procured and that will allow Sierra Club to more adequately respond to the contentions made by Defendants.

(Motion, p.3, FN 1.)

Sierra Club requests that the Board grant an additional 28 days, until August 25, 2014, to allow it to make this request for "more substantial" extension. *Id.* at para. 8. Any such request, however, could have been included in Sierra Club's Motion (in particular since Sierra Club raised the very same issues before the federal court).

III. ARGUMENT

Sierra Club is represented by an Illinois attorney and has substantial knowledge of the relevant facts related to the Project, which it has contested in state administrative and federal judicial fora. Rather than engaging the merits of its claim, Sierra Club is instead appears to be engaging in a calculated delay strategy designed to prevent financing of the Project.

Respondents submit that Sierra Club's apparent "delay" strategy is a necessary product of its failed basis for any legitimate claims.

As Sierra Club has indicated in its Motion – and as it indicated in federal court – it believes discovery is necessary for it to establish that IEPA issued the wrong permit for the Project. A candid litigant might have explained why soon after receiving Respondents' motions. But, Sierra Club chose not to do so.

Respondents have moved for expedited review of this case for the reasons set forth in their Motion to Expedite, namely that material prejudice will result from handling this case in the usual course. 35 Ill. Adm. Code 101.512. Instead of responding to Respondents' Motions in the time period required, Sierra Club offered up only hollow excuses. Sierra Club's Motion should be denied. Furthermore, because Sierra Club has failed to respond to Respondents' pending motions in accordance with the Board rules, any future responses will be untimely and should be stricken.

IV. CONCLUSION

For the reasons set forth herein, Respondents respectfully request that the Board deny Sierra Club's Motion, vacate its preliminary order staying Sierra Club's deadline to respond to Respondents' Motions, and at a minimum direct Sierra Club to respond to these motions on or before Tuesday, August 5, 2014.

Respondents further note that on July 30, 2014, the Hearing Officer ordered the parties to appear for a telephonic status conference on September 8, 2014. In light of the need to expedite this case, as acknowledged by the Board's July 24th order, Defendants respectfully request that the date for a telephonic status conference be advanced to a date no later than August 11, 2014.

Respectfully submitted this 31st day of July, 2014.

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CERTIFICATE OF SERVICE

I, the undersigned, certify that I have served the attached NOTICE OF FILING; RESPONDENTS' RESPONSE TO SIERRA CLUB'S MOTION FOR EXTENSION OF TIME TO RESPOND TO MOTION FOR SUMMARY JUDGMENT AND MOTION TO EXPEDITE; and this CERTIFICATE OF SERVICE upon the following persons:

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